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AGENDA ITEM
For Meeting of: 3-6-97

February 26, 1997

MEMORANDUM

TO: The Commission

THROUGH: John C. Surina
Staff Director

FROM: Lawrence M. Noble
General Counsel

N. Bradley Litchfield
Associate General Counsel

Michael G. Marinelli *Michael G. Marinelli*
Staff Attorney

SUBJECT: Draft AO 1997-02

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for March 6, 1997.

Attachment

DRAFT

1 ADVISORY OPINION 1997-2

2
3 Jan Witold Baran
4 Wiley, Rein & Field
5 1776 K Street, N.W.
6 Washington, DC 20006-2359

7
8 Robert F. Bauer
9 Perkins Coie
10 607 14th Street, N.W.
11 Washington, D.C. 20005-2011

12
13 Dear Mr. Baran and Mr. Bauer:

14
15 This responds to your letters dated February 11 and 5, 1997, on behalf of
16 U.S. Representatives David E. Skaggs and Ray LaHood. They request an
17 advisory opinion concerning application of the Federal Election Campaign Act of 1971,
18 as amended ("the Act"), and Commission regulations to the use of campaign funds ~~for~~
19 for the travel expenses and attendance fees of Members, and their spouses and
20 children to participate in a Bipartisan Congressional Retreat.

21 Your letters state that the Congressional Institute and The Aspen Institute, Inc.,
22 with the support of the Democratic and Republican House leadership, are planning a
23 Bipartisan Congressional Retreat ("the Retreat") for Members, Members' spouses and
24 families, and select Congressional staff. Messrs. Skaggs and LaHood, as well as other
25 Representatives, first proposed the Retreat and are planning to attend. The costs of the
26 Retreat will be underwritten, in principal part, by a grant from the Pew Charitable Trusts.
27 Retreat organizers will seek to defray the balance of the expenses by charging an
28 attendance fee of \$60 for Members, an additional \$30 each for Member's spouses and
29 \$10 for the children of attending Members. You state that some Members will also be
30 paying travel expenses related to the Retreat.

1 The Retreat will be held at the Hershey Lodge and Convention Center in Hershey,
2 Pennsylvania, the weekend of March 7-9, 1997. Members and their families and some
3 staff will travel together by bus and train from Washington to Hershey, and spend the
4 weekend together at the Lodge and Convention Center.¹ During the Retreat, Members
5 from both parties and their spouses will attend a wide variety of sessions on public policy
6 and political matters, and consider the impact of their Congressional duties on their
7 personal and family lives. The stated purpose of the Retreat is to attempt to reduce the
8 lack of familiarity and lack of trust among Members that has contributed to what has been
9 perceived by Members as a hostile legislative and political environment. The hope is that
10 the Retreat experience will permit "Members to get to know each other before the
11 difficult work of 105th Congress [begins] in earnest and to establish a more constructive
12 spirit and ethic for member-to-member relations."

13 You state that a full program has been developed with plenary and small group
14 sessions.² The plenary session, attended by all Members and families, will provide
15 historical context and provide Member interactions. Members will thereafter meet in
16 small group sessions to further analyze the current difficulties in House Member
17 interactions and to address possible changes leading to a more effective House working

¹ With respect to the travel, you further clarify that approximately 18-20 staff will also attend the retreat, and they are primarily from Republican and Democratic House leadership offices. They will attend to help facilitate the Retreat and will not be accompanied by spouses or family and so will not be charged a fee. Their travel expenses are also not an issue in this opinion.

² You explain that the Retreat program will include the presentation of a research paper from Kathryn Hall Jamieson, of the Annenberg School for Communications at the University of Pennsylvania, to examine the history of relations among Members of Congress, old patterns and new standards of discourse and (in the words of the grant proposal to the Pew Charitable Trusts) offer "some suggestion for setting reasonable expectations for improving Members' interactions and dialogue." A presentation will also be made by historian David McCulloch and a video has been prepared to show the historical context of Congressional discourse and citizen reaction.

1 environment. Members' spouses will also attend working sessions. While Members and
2 their spouses are in various groups, a full children's program will be available in order "to
3 keep all participants involved." With respect to the "children's program," you explain ^{a request} ~~as~~
4 that Hershey ~~Park~~ ^{Lakeview Connection Center} regularly provides children's programs for families of conference
5 attendees. In addition, you state that the Retreat will have a special dinner on the second
6 (and last) evening of this event for all Members, spouses and children.

7 With respect to the nature of the travel expenses, you state that they will fall into
8 two categories. First, some Members' spouses and families do not reside in the
9 Washington, D.C. area. Accordingly, you explain that such participants would have
10 expenses for travel to Washington where they would join the group for the trip to
11 Hershey. Second, some Members and/or their families might travel directly to Hershey
12 without using the bus and train transportation provided as part of the Retreat program.
13 Such participants would also incur travel expenses. The vast majority of participants, you
14 believe, are expected to utilize the round-trip transportation that will be provided by the
15 sponsors of the Retreat. You ask whether the Members may lawfully pay the travel
16 expenses and the Retreat attendance fees for themselves, their spouses and their children
17 from their campaign funds.³

18 Under the Act and Commission regulations, a candidate and the candidate's
19 committee have wide discretion in making expenditures to influence the candidate's
20 election, but may not convert campaign funds to the personal use of the candidate or any

³ You explain that, to the extent that any Member uses excess campaign funds to defray attendance fees and travel expenses, it will only be for the Member and his or her spouse and family.

1 other person. 2 U.S.C. §§431(9) and 439a; 11 CFR 113.1(g) and 113.2(d)⁴; see also
2 Advisory Opinions 1996-45, 1996-20, 1996-19, 1996-9, 1995-47, and 1995-46. A
3 specific exemption to the ban on personal use, however, permits the use of campaign
4 funds to defray any ordinary and necessary expenses incurred in connection with a
5 person's duties as a holder of Federal office. 2 U.S.C. §439a; 11 CFR 113.2(a) and (d).
6 In addition, Commission regulations define personal use as "any use of funds in a
7 campaign account of a present or former candidate to fulfill a commitment, obligation, or
8 expense of any person that would exist irrespective of the candidate's campaign or duties
9 as a Federal officeholder." 11 CFR 113.1(g).

10 Commission regulations list a number of expense categories that would constitute
11 personal use. 11 CFR 113.1(g)(1)(i).⁵ Where a specific use is not listed as personal use,
12 the Commission makes a determination on a case-by-case basis. 11 CFR 113.1(g)(1)(ii).⁶
13 Travel expenses, including subsistence expenses incurred during travel, are among those
14 expenses to be analyzed on a case-by-case basis. If such travel involves both personal
15 activities and campaign or officeholder related activities, the incremental expenses that
16 result from personal activities are personal use, unless the person benefiting reimburses

⁴ Commission regulations define the phrase "excess campaign funds" to mean "amounts received by a candidate as contributions which he or she determines are in excess of any amount necessary to defray his or her campaign expenditures." 11 CFR 113.1(e).

⁵ These expense categories include, but are not limited to: household food items; funeral, cremation or burial expenses; clothing; tuition payments not associated with training campaign staff; mortgage, rent or utility payments for the personal residence of a candidate; tickets to non-campaign or non-officeholder entertainment; dues, fees or gratuities to nonpolitical organizations, unless related to a specific fundraising event; and salary payments to family members, unless paid for bona fide, campaign-related services.

⁶ In explaining the application of the case-by-case approach, the Commission "reaffirm[ed] its long-standing opinion that candidates have wide discretion over the use of campaign funds. If the candidate can reasonably show that the expenses at issue resulted from campaign or officeholder activities, the Commission will not consider the use to be personal use." Explanation and Justification, Commission Regulations on Personal Use of Campaign Funds, 60 *Fed. Reg.* 7862, 7867 (February 9, 1995).

1 the campaign within thirty days for the amount of those expenses. 11 CFR
2 113.1(g)(1)(ii)(C).

3 Under 11 CFR 113.2(a) excess campaign funds may also be used to pay any
4 ordinary and necessary expenses incurred in connection with one's duties as a holder of
5 Federal office. These include the costs of travel for a Federal officeholder and an
6 accompanying spouse to participate in a function directly connected to *bona fide* official
7 responsibilities, such as a fact-finding meeting or an event at which the officeholder's
8 services are provided through a speech or appearance in an official capacity.⁷

9 The purpose of the Retreat is to improve the effectiveness and quality of the
10 legislative environment in the House of Representatives. Legislation is the principal
11 *bona fide* official responsibility of each Member of Congress. Consequently, attending
12 the Retreat is directly related to each participating Representative's official
13 responsibilities as a Federal officeholder. The Commission notes that this relationship is
14 attested to by the special factors inherent in the event; in particular, its bipartisan support,
15 its support among the House leadership and the expected attendance by a large number of
16 House Members of both major political parties. It is also clear that costs of traveling to
17 (and from) and attending the Retreat would not exist absent each Member's duties as a
18 Federal officeholder. See Advisory Opinions 1996-45 and 1996-19.⁸ The Commission

⁷ The other listed purpose is the costs of winding down the office of a former Federal officeholder for a period of six months after he or she leaves office. 11 CFR 113.2(a)(2); See also Advisory Opinions 1996-44 and 1996-14.

⁸ The circumstances in this request are similar to those in Advisory Opinion 1996-45, where the Commission concluded that a seminar hosted by a Member in her district to focus on the ways in which participants can become more sensitive and responsive to persons from different racial and ethnic backgrounds was connected to that Member's duties as a Federal officeholder. The Commission concluded that the use of campaign funds to pay travel costs for consultants to help run the seminar would not constitute personal use. In Advisory Opinion 1996-19, the Commission noted the application of

1 concludes, therefore, that the travel expenses and attendance fees of Members of
2 Congress to participate in the Retreat could be paid using the Member's campaign funds.⁹

3 A similar analysis holds for the travel expenses of each participating Member's
4 spouse. Since the event is in furtherance of each attendee's *bona fide* official
5 responsibilities under section 113.2(a)(1), campaign funds may be used to pay for the
6 travel and attendance fees of each Member's spouse.

7 The situation regarding the children of attending Member participants is different.
8 The Commission notes that the language of section 113.2(a)(1) does not cover the travel
9 expenses of an officeholder's children to attend official officeholder events. Further, the
10 description of the children's program and their involvement in the weekend activity
11 shows no link with the substantive elements in the Retreat and only an incidental link to
12 the weekend event itself.¹⁰ The children's program at Hershey Park presents additional
13 problems. The Commission notes that section 113.1(g)(1)(i)(G) includes as personal use
14 of campaign funds "[a]dmission to a sporting event, concert, theater or other form of
15 entertainment, unless part of a specific...officeholder activity." The lack of any
16 substantive link between the children's program, as described in your request, with the
17 Retreat itself would mean that any payment for the Retreat expenses of the Members'

section 113.2(a)(1) to the travel expenses of a Member and his spouse to attend a national party nominating convention where both would be meeting with constituents at various official functions.

⁹ Since the facts of your request do not suggest a campaign related purpose to the Retreat, the analysis of this opinion focuses solely on the elements relevant to each participant's duties as a holder of Federal office.

¹⁰ The incidental status of their participation is illustrated in your request. You state that the children are invited to attend the one dinner and the plenary session, however, the materials you provide do not indicate that any of the discussions will be directed to the children or deal with the pressures they might face as the children of Members. Furthermore, nothing in the request indicates that the program presented to the children at Hershey Park, while the Member and spouse are involved in small group discussions, will have any substantive link to the Retreat's purposes and objectives.

Lodge Convention Center

1 children would be deemed a personal expense. Considering all these factors together, the
2 Commission concludes that the use of campaign funds to pay for the travel and
3 attendance fees for the children of Members attending the Retreat would constitute an
4 unlawful personal use of campaign funds under 2 U.S.C. §439a and 11 CFR 113.1(g).¹¹

5 In view of the fact that any campaign committee disbursements, held permissible
6 in this opinion, are not campaign related, they should be reported as "other
7 disbursements." The purpose of the disbursements and other information must be
8 disclosed for payments that exceed \$200 to the same payee. 11 CFR 104.3(b)(4)(vi); see
9 Advisory Opinions 1996-45 and 1996-44. Furthermore, to the extent that any Member
10 may have used his/her campaign funds for the travel expenses or fees of the Member's
11 children, such amounts must be reimbursed by the Member from personal funds within
12 30 days of the date of this opinion.

13 The Commission expresses no opinion regarding the application of any rules of
14 the U.S. House of Representatives or any tax ramifications of the proposed activity,
15 because those issues are not within its jurisdiction.

¹¹ The Commission notes that the prior opinions (Advisory Opinions 1995-20, 1995-42, 1996-19 and 1996-34) dealing with the use of campaign funds to pay for children's travel or childcare are all distinguishable from the current request. These opinions all considered campaign activity, rather than Federal officeholder activity. Furthermore, the opinions concerned situations where the children were involved directly in the campaign activity and event (Advisory Opinions 1996-19 and 1996-34), or were infants or toddlers and could not be separated from their parents (Advisory Opinion 1995-20) or left without care while the parents participated in campaign related events (Advisory Opinion 1995-42).

